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Supreme Court, U.S.
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NO. (D) _____

IN THE UNITED STATES SUPREME COURT

ADVANTAGE MEDIA, L.L.C.,

Petitioner,

v.

CITY OF HOPKINS, MINNESOTA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether a plaintiff who obtains a preliminary injunction barring the continued enforcement of an unconstitutional municipal ordinance, followed by a permanent change in conduct by the municipality, is a prevailing party pursuant to 42 U.S.C. § 1988, even though the plaintiff does not ultimately prevail as to any other claims.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to this proceeding are properly set forth in the case caption. Petitioner Advantage Media, L.L.C. ("Advantage Media" or "Advantage") has no parent corporation and no publicly held company owns ten percent or more of the company's common stock.

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The published opinion of the three-judge panel of the Eighth Circuit Court of Appeals is reported as *Advantage Media, L.L.C. v. City of Hopkins*, 511 F.3d 833 (8th Cir. 2008).[1] The opinion of the district court denying Petitioner's Motion for Attorneys' Fees was unpublished, but was assigned a Westlaw cite at 2007 WL 270426 (D. Minn. Jan. 29, 2007). The district court's opinion granting Petitioner's Motion for Preliminary Injunctior is reported at 379 F. Supp. 2d 1030 (D. Minn. 2005).

JURISDICTION

The Court of Appeals entered judgment on January 8, 2008. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1988(b) of Title 42 of the United States Code states that "[i]n any action or proceeding to enforce a provision of [section 1983], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

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[1] The Appendix attached hereto includes the circuit court decision (1a-11a), the district court decision on fees (12a-21a), and the district court's injunction order (22a-54a).

STATEMENT

I. OVERVIEW OF THE CASE

Following the City of Hopkins' refusal to process four sign applications, Petitioner Advantage Media, L.L.C. ("Advantage") filed suit in December of 2004, alleging that the City's Sign Ordinance violated the First Amendment. (2a, 13a). On July 5, 2005, Petitioner filed a Motion for Preliminary Injunction seeking to enjoin enforcement of the Ordinance. (3a, 13a). After hearing oral argument from the parties, the district court issued a preliminary injunction. *Advantage Media, L.L.C. v. City of Hopkins*, 379 F. Supp. 2d 1030 (D. Minn. 2005) (13a, 22a-54a).

The district court held that Advantage succeeded in showing that the Sign Ordinance was content-based, could not satisfy strict scrutiny, and violated equal protection. 379 F. Supp. at 1038-43 (34a-52a). Moreover, the court held that "Plaintiffs have demonstrated a substantial likelihood of success that the remainder of the Sign Ordinance, Section 570 of the Hopkins Zoning Code, is unenforceable," and therefore enjoined the City from enforcing the entire Sign Ordinance. *Id.* at 1048 (52a-54a).

Closely following the issuance of the injunction, the City enacted an emergency interim ordinance on August 3, 2005. (3a). On August 16, 2005, the City adopted Ordinance No. 2005-955, which corrected the problems that had been identified by Advantage and recognized in the injunction order. (3a, 14a).

The City attempted to have the injunction order vacated based upon its passage of the new sign code, but the district court refused to undo the injunction. *Advantage Media, L.L.C. v. City of Hopkins*, 408 F. Supp. 2d 780, 788-90 (D. Minn. 2006).

Following the conclusion of the case, Advantage timely filed a very limited Motion for Attorneys' Fees and Costs on October 30, 2006. (4a). Advantage sought only a fraction of its total fees and costs, those that were directly necessary to obtain the preliminary injunction and change in conduct. (15a). On January 29, 2007, the district court entered an order denying Advantage's Motion for Attorneys' Fees on the ground that Advantage was not a prevailing party. (4a-5a). Advantage timely filed a Notice of Appeal. (5a). On January 8, 2008, the Eighth Circuit Court of Appeals affirmed the lower court's conclusion that Advantage was not a prevailing party. (1a-11a).

II. FACTUAL BACKGROUND OF THE CASE

Advantage is a limited liability company organized in the State of Minnesota for the purpose of erecting and operating signs to be used to advertise commercial and noncommercial topics. (23a). In November of 2004, Advantage submitted four sign application packages to the City of Hopkins. (24a). The City refused to accept the applications for processing, despite Advantage's repeated requests. *Id.* On December 4, 2004, the application packages were returned without action to Advantage. *Id.* As a result of the City's refusal to accept and process the applications, Advantage filed

suit against the City alleging its Sign Ordinance was unconstitutional. (13a).

On July 29, 2005, the district court granted Advantage's Motion for Preliminary Injunction, and enjoined the continued enforcement of the Sign Ordinance. *Advantage Media, L.L.C. v. City of Hopkins*, 379 F. Supp. 2d 1030, 1048 (D. Minn. 2005) (22a-54a). Based entirely upon the injunction order, the City enacted an emergency interim ordinance on August 3, 2006 to control signs until the City adopted a new sign code. *See* Ordinance No. 2005-954 (describing issuance of injunction and stating "[a]s a result of the injunction, Hopkins is without any regulation regarding signs") (Exh. B to Dkt. No. 26). On August 16, 2005, the Hopkins City Council repealed the Sign Ordinance (Section 570 of the Zoning Code) and the interim ordinance and enacted Ordinance No. 2005-955, which regulated signs. *See* Resolution No. 2005-75 (Exh. C to Dkt. No. 26); Ordinance No. 2005-956 (Exh. D to Dkt. No. 26); Ordinance No. 2005-955 (Exh. E to Dkt. No. 26). In August of 2005, the Hopkins City Council repeatedly adopted the following language:

> [a] lawsuit has been filed against the City of Hopkins (Advantage Media, L.L.C., et al. v. City of Hopkins, U.S. Dist. Ct. File No. 04-04959, hereinafter the "Lawsuit") challenging the constitutionality of the Sign Ordinances. On July 29, 2005, U.S. District Court Judge Michael Davis issued a preliminary injunction in the Lawsuit preventing Hopkins from

> enforcing the Sign Ordinances while the injunction is in place.

Id. These documents also stated "[a]s a result of the injunction, Hopkins is without any regulation regarding signs." *See* Ordinance No. 2005-954 (Exh. B to Dkt. No. 26). Thus, it is undeniable that as a result of the injunction order in Advantage's favor, the City adopted new sign regulations aimed at correcting the constitutional problems identified by Advantage.

III. PROCEEDINGS BELOW

On December 8, 2004, Advantage filed suit against Hopkins, alleging that the City's Sign Ordinance violated the First Amendment. (13a). On July 5, 2005, Petitioner filed a Motion for Preliminary Injunction seeking to enjoin enforcement of the Ordinance. (13a). After hearing oral argument from the parties on July 27, 2005, the district court issued a preliminary injunction. 379 F. Supp. 2d at 1048 (13a). The district court held that Advantage had succeeded in showing that the Sign Ordinance was unconstitutional. *Id.* at 1038-43 (34a-52a). Moreover, the court enjoined the City from enforcing the entire Sign Ordinance. *Id.* at 1048 (52a-54a).

Rather than appeal the injunction order, the City enacted an emergency interim ordinance on August 3, 2006 and a new sign code on August 16, 2005. (3a; 14a). The new ordinance corrected the problems that had been pointed out by Advantage and recognized by the lower court. (3a).

On August 8, 2005, Advantage filed its Motion for Partial Summary Judgment. (3a). The City filed its Motion for Summary Judgment on August 19, 2005. (3a). On January 5, 2006, the district court denied Advantage's motion and granted in part the City's Motion. *Advantage Media, L.L.C. v. City of Hopkins*, 408 F. Supp. 2d 780 (D. Minn. 2006). (4a, 14a). The court refused to undo its earlier injunction order. *Id.* at 788-90 (refusing to revisit prior holdings on injunctive relief). The court also denied the City's request to dismiss Advantage's claims for damages and fees and set the case for a jury trial on the issue of damages. *Id.* at 796-97. (4a).

After a two-day trial on the issue of causation and damages, the jury found in favor of the City. (4a). Thereafter, Advantage filed a very limited Motion for Attorneys' Fees and Costs seeking only the fees and costs necessitated by the City's initial refusal to change its sign regulations. *Id.* The City subsequently filed a competing Motion for Attorneys' Fees and supporting documentation. *Id.* On January 29, 2007, the district court denied Advantage's motion on the ground that Advantage was not a prevailing party. (4a-5a, 12a-21a). The court also denied the City's fee request. *Id.* Advantage appealed. (2a).

REASONS FOR GRANTING THE PETITION

The Eighth Circuit's decision has created a split among the circuit courts with regard to whether a litigant who obtains an injunction that forces a change in governmental conduct, rather than merely maintaining the status quo, qualifies as a prevailing party for the purposes of 42 U.S.C. § 1988. The Eighth Circuit's conclusion that Advantage's success in obtaining an enforceable injunction order, which prevented the continued enforcement of an unconstitutional sign ordinance, failed to confer prevailing party status is contrary to recent decisions of the Fifth, Ninth, Eleventh, and District of Columbia Circuit Courts. Each of those courts has held that court-ordered injunctions that do more than merely maintain the status quo are sufficient to convey prevailing party status. The Eighth Circuit's holding to the contrary has created a split among the circuits that should be addressed by this Court.

This petition should also be granted to address the Eighth Circuit's apparent resurrection of the "central issue" test. In determining whether Advantage was a prevailing party, the Eighth Circuit focused almost exclusively on whether Advantage was able to erect its proposed signs as a result of this litigation. Since Advantage never erected the signs it applied for, the Eighth Circuit reasoned it was not a prevailing party. This Court has previously determined that focusing on a litigant's central concern when determining prevailing party status is improper. As such, the Eighth Circuit's reliance on this principle should be addressed.

Granting this Petition will also allow this Court to clarify whether its decision in *Buckhannon*

Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources, 532 U.S. 598 (2001), stands for the proposition that a party who obtains a judicially sanctioned change in the legal relationship through the issuance of a court order, followed by a permanent change in challenged conduct, qualifies as a prevailing party under 42 U.S.C. § 1988.

Finally, granting this Petition will allow this Court to answer the question it specifically left unanswered in *Sole v. Wyner*, 127 S. Ct. 2188, 2196 (2007), namely "whether, in the absence of a final decision on the merits . . . success in gaining a preliminary injunction may sometimes warrant an award of counsel fees."

I. THE EIGHTH CIRCUIT'S DECISION CREATES A SPLIT AMONG THE CIRCUITS AS TO WHETHER A PRELIMINARY INJUNCTION ORDER FOLLOWED BY A CHANGE IN GOVERNMENT CONDUCT CONVEYS PREVAILING PARTY STATUS.

This Court has held that the term "prevailing party" should be "generously" interpreted so as to allow litigants to recover fees if "they succeed on any significant issue in litigation which achieves some of the benefit [that was sought] in bringing the suit." *Farrar v. Hobby*, 506 U.S. 103, 109 (1992); *also Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 790 (1989) (holding that a prevailing party is one who "has prevailed on an important matter in the course of litigation, even when he does not ultimately prevail on all issues"); *Hensley v.*

Eckerhart, 461 U.S. 424, 433 (1983). Circuit courts have necessarily followed suit. *E.g.*, *Southworth v. Board of Regents of Univ. of Wisc. Sys.*, 376 F.3d 757, 767-68 (7th Cir. 2004); *Balark v. City of Chicago*, 81 F.3d 658, 663-65 (7th Cir. 1996); *Head v. Medford*, 62 F.3d 351, 354 (11th Cir. 1995); *Hendrickson v. Branstad*, 934 F.2d 158, 161-62 (8th Cir. 1991) (parties "may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit").

Moreover, this Court has held that *any* enforceable order, no matter how limited, affords civil rights plaintiffs the ability to recover the attorney fees incurred in bringing suit. *Hewitt v. Helms*, 482 U.S. 755, 760 (1987). As this Court noted in *Garland*,

> If the plaintiff has succeeded on "any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit," the plaintiff has crossed the threshold to a fee award of some kind . . . . Thus, at a minimum, to be considered a prevailing party within the meaning of §1988, the plaintiff must be able to point to a resolution of the dispute, which changes the legal relationship between itself and the defendant . . . . The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner, which Congress sought to promote in the fee statute. Where such a change

> has occurred, the degree of the plaintiff's overall success goes to the reasonableness of the award under *Hensley* [*v. Eckerhart*, 461 U.S. 424 (1983)], not to the availability of a fee award vel non.

489 U.S. at 791-93. The "change in legal relationship" standard for determination of prevailing party status is not new. Circuit courts have consistently analyzed preliminary injunctions to determine whether the injunction merely preserved the status quo (thereby only scoring a "procedural" victory) or gave the plaintiff a benefit sought in the litigation so as to confer prevailing party status. *Compare Smalbein v. City of Daytona Beach*, 353 F.3d 901, 905 (11th Cir. 2003) (plaintiffs entitled to attorneys' fees because court ordered relief and retained jurisdiction to enforce relief, even though case was voluntarily dismissed with prejudice), *and LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1160-61 (9th Cir. 2000) (temporary restraining order, which prohibited public officials from interfering with exhibition containing non-obscene erotic art, was sufficient to confer prevailing party status), *and Ketterle v. B.P. Oil, Inc.*, 909 F.2d 425, 429 (11th Cir. 1990) (preliminary injunction sufficient to confer prevailing party status), *with Northern Cheyenne Tribe v. Jackson*, 433 F.3d 1083, 1086-87 (8th Cir. 2006) (status quo injunction insufficient to confer prevailing party status), *and Markham v. International Ass'n of Bridge, Structural & Ornamental Iron Workers*, 901 F.2d 1022 (11th Cir. 1990) (preliminary injunction insufficient to confer prevailing party status because injunction did not

change the legal relationship between the parties but rather preserved status quo).

Circuit courts have consistently held that when an injunction goes beyond the preservation of the status quo, a plaintiff becomes a prevailing party for purposes of Section 1988. *E.g.*, *Southworth*, 376 F.3d at 767-68; *Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 966 (D.C. Cir. 2004) (prevailing party recognized where preliminary injunction brought "a change in someone's primary conduct in the real world . . . [such as by the] imposition of a restriction on others") (citation omitted); *Murphy v. Fort Worth Indep. Sch. Dist.*, 334 F.3d 470, 471 (5th Cir. 2003); *LSO*, 205 F.3d at 1160-61 (TRO sufficient to confer prevailing party status); *Taylor v. City of Ft. Lauderdale*, 810 F.2d 1551, 1558 (11th Cir. 1987) (grant of a preliminary injunction on the merits, as opposed to temporary relief maintaining the status quo, entitles one to prevailing party status); *Virdi v. DeKalb County Sch. Dist.*, 2007 WL 330805, at *3-4 (11th Cir. Feb. 6, 2007) (unpublished decision); *also Select Milk Producers, Inc. v. Veneman*, 304 F. Supp. 2d 45 (D.D.C. 2004) (prevailing party status afforded where preliminary injunction created "material alteration in the legal relationship between the parties"), *aff'd in part, rev'd in part, on other grounds and remanded*, 400 F.3d 939 (D.C. Cir. 2005).

Despite this substantial body of case law, the Eighth Circuit concluded that Advantage was not a prevailing party. (8a-10a). The Eighth Circuit's conclusion that a party like Advantage is not a prevailing party under Section 1988, even though they received a comprehensive injunction order that went far beyond maintaining the status quo, is in sharp contrast to decisions from the Fifth, Seventh,

Ninth, Eleventh, and D.C. Circuits. Thus, as a result of the Eighth Circuit's opinion, a dangerous split now exists as to whether a party which obtains injunctive relief that changes the legal relationship between the parties is a prevailing party under 42 U.S.C. § 1988.

The seriousness of the split can be seen by comparing the Eighth Circuit's result here with opinions recently issued under similar circumstances by the Eleventh, Seventh, and Ninth Circuits. In *Virdi*, for example, the Eleventh Circuit reviewed whether a party that obtained injunctive relief qualified as a prevailing party. 2007 WL 330805, at *1-2. Even though the plaintiff, like Advantage, obtained an order enjoining the continued enforcement of the regulation in question, the district court held that the legal relationship between the plaintiff and defendant had not changed, nor had the plaintiff directly benefited from the injunction that was issued. *Id.* at *2. On appeal, the Eleventh Circuit reversed, holding that the plaintiff was a prevailing party because he obtained relief on the merits of his claim for injunctive relief. *Id.* at *3. The court summarized by stating,

> Virdi challenged a program that gave a preference to African-American firms applying for architectural contracts with the defendants. We held that program unconstitutional. Virdi now no longer faces the obstacle of the unconstitutional preference. Should he bid for contracts with the defendants in the future, he will be considered on a level playing field . . . . Virdi has therefore directly benefited from the

> injunction, which obviously changed the legal relationship between him and the defendants by prohibiting the defendants, under penalty of contempt, from applying an unconstitutional racial preference to Virdi's bids.

Id. The Eleventh Circuit also noted that the nature of the relief afforded the plaintiff also militated in favor of granting the plaintiff prevailing party status because "[a]n injunction is not lightly entered." *Id.* at *4.

In similar circumstances in *Southworth*, the Seventh Circuit affirmed the district court's award of attorneys' fees and costs to a plaintiff that achieved limited success. 376 F.3d at 766-72. The Seventh Circuit found that the plaintiffs were prevailing parties because they "obtained a court ruling in the district court that the mandatory fee system violated the principle of viewpoint neutrality, and in response to the district court's order, the University adopted the detailed procedures, criteria, and appeals process governing funding decisions." *Id.* at 768. The Seventh Circuit found that such conduct resulted from the court-ordered change in the legal relationship between the parties. *Id.* Advantage obtained a ruling that the Hopkins Sign Ordinance was unconstitutional and, in response, the City replaced its Sign Ordinance to correct the identified problems. Thus, under the Seventh Circuit's reasoning in *Southworth*, Advantage is a prevailing party that is entitled to some award of attorneys' fees and costs.

Likewise, in *Watson v. County of Riverside*, 300 F.3d 1092 (9th Cir. 2002), the Ninth Circuit held

that a party that obtained a preliminary injunction was a prevailing party under Section 1988 even though the plaintiff was not ultimately successful at the conclusion of the case. 300 F.3d at 1095-96. There, the court explained:

> We conclude that by obtaining the preliminary injunction appellees "prevailed on the merits of at least some of (their) claims" . . . . The preliminary injunction prevented appellants from continued enforcement of their original guidelines, which is precisely the relief appellees sought. Appellees succeeded on a "significant issue in litigation, which achieve(d) . . . the benefit the parties sought in bringing suit."

Id. at 1095. The Ninth Circuit continued, explaining, "[h]aving succeeded in winning a preliminary injunction . . . Watson obtained significant, court-ordered relief that accomplished one of the main purposes of his lawsuit. This is so even though he failed to prevail on his other claims." *Id.* at 1096.

Here, the district court's order granting Advantage's request for a preliminary injunction was clearly an enforceable order that changed the legal relationship of the parties. The injunction order did not maintain the status quo, but rather forced a material change in the relationship between Advantage and the City because the City was prevented from continuing to enforce an unconstitutional Sign Ordinance. Indeed, the City conceded that the injunction deprived it from having any enforceable sign regulations. *See* Ordinance No.

2005-954 ("[a]s a result of the injunction, Hopkins is without any regulation regarding signs") (Exh. B to Dkt. No. 26). But for the injunction, the City would have continued to enforce its invalid restrictions on speech. Indeed, it had continued to do so for over eight months following the filing of the Complaint.

Based on the injunction, the City took prompt action to correct the constitutional defects pointed out by Advantage. Thus, Advantage, having achieved relief by virtue of the injunction and the City's passage of a new sign code, is a prevailing party for the limited purpose of obtaining partial reimbursement of its fees and costs under 42 U.S.C. § 1988. *Hopkins*, 408 F. Supp. 2d at 794 (noting that City not free to return to its previous ways as a result of the injunction). Under *Virdi*, *Southworth*, and *Watson*, Advantage would undoubtedly have been found to be a prevailing party entitled to an award of fees and costs. However, under the analysis used by the Eighth Circuit, Advantage was found **not** to be a prevailing party. Given the disparity between the approach taken by the Eighth Circuit and the approaches taken by the Eleventh, Seventh, and Ninth Circuits under very similar circumstances, this Petition should be granted to address this split.

II. THE EIGHTH CIRCUIT'S USE OF THE "CENTRAL ISSUE" TEST TO DETERMINE ADVANTAGE WAS NOT A PREVAILING PARTY WARRANTS REVIEW.

In affirming the district court's denial of Advantage's request for attorneys' fees, the Eighth

Circuit, on several occasions, focused on what it felt were Advantage's goals in bringing this litigation. For example, the circuit court surmised that Advantage "filed suit to erect its signs in Hopkins, to obtain damages for violation of its constitutional right to free speech, and to enjoin the city from enforcing a purportedly unconstitutional ordinance." (8a). Then, the court proceeded to focus almost entirely on what Advantage did not accomplish during this litigation. *Id.* ("Advantage obtained no relief in respect to its first goal"); *id.* at 9a (noting Advantage failed to obtain damages); *id.* at 10a (again noting Advantage failed to obtain permission to erect its signs).

Indeed, the court placed great emphasis on the fact that nothing in the preliminary injunction established that Advantage could build the billboards for which it applied. (9a). Relying on the Eleventh Circuit's decision in *Granite State Outdoor Advertising, Inc. v. City of St. Peterbsurg*, 348 F.3d 1278 (11th Cir. 2003), the Eighth Circuit noted "[t]he signs Advantage sought to erect have never been built, and it is no closer to erecting its billboards than it was when the litigation began." (8a-9a).[2]

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[2] Substantively, the Eighth Circuit's reliance on *St. Petersburg* is misplaced. The Eleventh Circuit in *St. Petersburg* was not faced with the question of whether a party which obtained a preliminary injunction but ultimately did not succeed at trial was a prevailing party, but rather dealt with a party whose facial challenge, while initially successful, was reversed on appeal. 348 F.3d at 1283-84. Given that the plaintiff in *St. Petersburg* did not obtain an injunction order in its favor that prompted a change in behavior by the defendant, the Eighth Circuit's extension of the Eleventh Circuit's holding to the disparate facts of this case was erroneous.

As noted above, obtaining the signs it applied for was not the only goal of Advantage in commencing this lawsuit, but rather Advantage sought from the beginning injunctive relief to prevent further enforcement of the City's unconstitutional Sign Ordinance. See Amended Complaint, p. 1 (entitled "Request for Injunctive Relief"), ¶¶ 43, 48, 52, 56, 62, 66, 70, 74, 79, 83, 87, 99, 101-107 (specific count for injunctive relief), p. 32 (requesting injunctive relief) (Dkt. No. 3). While the Eighth Circuit acknowledges that Advantage sought injunctive relief, it glosses over this success and focuses on Advantage's lack of success as to other claims, all of which came **after** the issuance of the injunction. The court's focus on Advantage's central concern in determining whether it was a prevailing party is contrary to this Court's opinion in *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782 (1989).

In *Garland*, this Court held that it is entirely irrelevant what a party's "central concern" is in bringing an action. 489 U.S. at 791. In rejecting the "central issue" test, which the Eighth Circuit appears to have resurrected here, this Court noted,

> Nor does the central issue test have much to recommend it from the viewpoint of judicial administration of § 1988 and other fee shifting provisions. By focusing on the subjective importance of an issue to the litigants, it asks a question which is almost impossible to answer. Is the "primary relief sought" in a disparate treatment action under Title VII reinstatement,

> backpay, or injunctive relief? This question, the answer to which appears to depend largely on the mental state of the parties, is wholly irrelevant to the purposes behind the fee shifting provisions, and promises to mire district courts entertaining fee applications in an inquiry which two commentators have described as "excruciating." *See* M. Schwartz & J. Kirklin, *Section 1983 Litigation: Claims, Defenses, and Fees* § 15.11, p. 348 (1986). Creating such an unstable threshold to fee eligibility is sure to provoke prolonged litigation, thus deterring settlement of fee disputes and ensuring that the fee application will spawn a second litigation of significant dimension. In sum, the search for the "central" and "tangential" issues in the lawsuit, or for the "primary," as opposed to the "secondary," relief sought, much like the search for the golden fleece, distracts the district court from the primary purposes behind § 1988 and is essentially unhelpful in defining the term "prevailing party."

Id. This holding has been widely acknowledged by numerous circuit courts of appeal. *E.g., Mercer v. Duke Univ.*, 401 F.3d 199, 205 (4th Cir. 2005) (noting "the Court in *Garland* made it clear that the subjective motives of the plaintiff are not relevant to determining whether the plaintiff is a prevailing party"); *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748,

757 (2nd Cir. 1998) (same); *Stivers v. Pierce*, 71 F.3d 732, 751 (9th Cir. 1995) (litigant need not prevail on every issue, or even on central issue in case, to be considered "prevailing party," but rather, it is enough that he succeed on any significant claim affording some of relief sought); *Krichinsky v. Knox County Schools*, 963 F.2d 847, 850 (6th Cir. 1992) (reversing the district court's decision to focus on the central issue of plaintiff in bring action); *Shipes v. Trinity Industries, Inc.*, 883 F.2d 339, 343 (5th Cir. 1989) ("In *Garland*, the Court rejected this circuit's rule that in order to be a 'prevailing party,' entitled to fees under sec. 1988, the plaintiff must prevail on the issue central to their case"); *Virdi*, 2007 WL 330805, at *5 (finding "it is also entirely irrelevant what [the plaintiff's] central concern was" when evaluating whether a plaintiff is a prevailing party).

Therefore, the Eighth Circuit's decision to focus on what it perceived to be Advantage's main concern in bringing this action in order to determine whether it was a prevailing party is contrary to *Garland* and numerous precedents from other courts of appeal. Thus, Advantage's Petition should be granted.

III. AS AN INJUNCTION ORDER WAS THE "CATALYST" FOR THE CITY'S CHANGE IN CONDUCT, ADVANTAGE IS DUE AN AWARD OF FEES.

Advantage's Petition should also be granted to clarify this Court's holding in *Buckhannon* with respect to the catalyst theory. It cannot be seriously disputed that the City's passage of a new sign code in August of 2005 was a direct result of the lower

court's issuance of an injunction order in favor of Advantage. *E.g.*, Ordinance No. 2005-954 (stating "[a] lawsuit has been filed against the City of Hopkins . . . challenging the constitutionality of the Sign Ordinances. On July 29, 2005, U.S. District Court Judge Michael Davis issued a preliminary injunction in the Lawsuit preventing Hopkins from enforcing the Sign Ordinances while the injunction is in place") (Exh. B to Dkt. No. 26); Resolution No. 2005-75 ("the City Council hereby resolves that the lack of a comprehensive, constitutionally sound ordinance regulating signs in the City of Hopkins constitutes an emergency and adopts and approves [the new sign regulations]") (Exh. C to Dkt. No. 26); Ordinance No. 2005-955 (Exh. D to Dkt. No. 26); Ordinance No. 2005-956 (Exh. E to Dkt. No. 26). Given that the City's change in conduct was in response to an order in Advantage's favor, under this Court's holding in *Buckhannon*, Advantage is due an award of attorneys' fees.

Prior to the year 2000 and this Court's decision in *Buckhannon*, the City's change in conduct alone would have meant that Advantage's fees and costs were to be awarded without further analysis. *E.g.*, *Hewitt v. Helms*, 482 U.S. 755 (1987). This Court's decision in *Buckhannon* changed the analysis somewhat but not the proper result with respect to this case.

In *Buckhannon*, the Court did reject the pure catalyst theory, holding instead that a judicially sanctioned change in the legal relationship of the parties was necessary for an award of fees. 532 U.S. at 610. The injunction awarded Advantage in this case unquestionably satisfies this Court's requirement of a judicially sanctioned change, as the

injunction created a mandatory duty upon the City of Hopkins to cease enforcement of its Sign Ordinance, a violation of which would have been sanctionable by contempt from the trial court. 408 F. Supp. 2d at 734. The order thus clearly constituted a judicially sanctioned change in the legal relationship of the parties. When an order is joined with a change in conduct, the catalyst theory undeniably lives on. In light of the injunction order and the City's new sign code, *Buckhannon* affirmatively supports an award of fees and costs to Advantage.

Such a result has been recognized by several circuit courts of appeal following *Buckhannon*. *E.g.*, *Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939, 945 (D.C. Cir. 2005); *Palmetto Props. v. County of DuPage*, 375 F.3d 542, 547-52 (7th Cir. 2004); *Maine Sch. Admin. Dist. No. 35 v. Mr. R.*, 321 F.3d 9, 15-16 (1st Cir. 2003); *Dubec v. Green Oak Township*, 312 F.3d 736, 753, 754, n.8 (6th Cir. 2002). In *Select Milk*, for example, the circuit court held,

> Although *Buckhannon* decisively rejected the "catalyst theory," the Court clearly did not adopt a rule that plaintiffs could only be deemed "prevailing parties" for fee-shifting purposes if they obtained a final judgment on the merits of a suit.
>
> In short, the holding in *Buckhannon* embraces the possibility that, under certain circumstances, a preliminary injunction, like a consent decree, may result in a court-ordered change in the legal relationship between the parties that is sufficient to make the

> plaintiff a "prevailing party" under a fee-shifting statute . . . . Therefore, *Buckhannon* surely does not endorse a *per se* rule that a preliminary injunction can never transform a party in whose favor the injunction is issued into a "prevailing party" . . . .

400 F.3d at 945; *see also Dubuc*, 312 F.3d at 753 (acknowledging *Buckhannon's* rejection of the catalyst theory, but holding that preliminary injunctions can support prevailing party status where the relief afforded was not merely procedural); *Palmetto Props.*, 375 F.3d at 547-52 (analyzing *Buckhannon* and finding that county's repeal of unconstitutional provision that resulted in dismissal for mootness did not deprive plaintiff of prevailing party status).[3]

Under the circumstances of this case, where it is clear that the City of Hopkins did not stop enforcing its former Sign Ordinance voluntarily, but as a result of the court-ordered injunction, Advantage is due the small fraction of its fees as requested. Granting this Petition will allow the Court to clarify the holding in *Buckhannon* for situations where a litigant obtains an initial order

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[3] *Environmental Protection Info. Ctr., Inc. v. Pacific Lumber Co.*, 229 F. Supp. 2d 993, 1004 (N.D. Cal. 2002) (despite dismissal of action for mootness following initial injunctive relief, plaintiffs were prevailing parties because, "Defendants did not stop logging voluntarily, but as a result of the court-issued TRO" . . . . Thus, plaintiffs' efforts resulted in a court-ordered change in the relationship between the parties, supporting compensation under *Buckhannon*) (citation omitted), aff'd, 103 Fed. Appx. 627 (9th Cir. 2004).

followed by a change in behavior, but does not ultimately prevail on other claims.

IV. GRANTING THIS PETITION WILL ALLOW THIS COURT TO ANSWER UNRESOLVED QUESTIONS FROM *SOLE V. WYNER*.

Granting Advantage's Petition is also important because it will allow this Court the opportunity to resolve questions that remained unanswered following this Court's recent opinion in *Sole v. Wyner*. In *Sole*, the Court held that "[p]revailing party status . . . does not attend achievement of a preliminary injunction that is reversed, dissolved, or otherwise undone by the final decision in the same case." 127 S. Ct. at 2196. However, this Court made it clear that the question of "whether, in the absence of a final decision on the merits . . . success in gaining a preliminary injunction may sometimes warrant an award of counsel fees." *Id.*

Despite this Court's acknowledgement that its holding in *Sole* was not applicable in cases such as this one, the Eighth Circuit nevertheless attempted to fit the facts of this case into *Sole's* narrow holding. (10a-11a). Most importantly, the Eighth Circuit's conclusion that the jury's final verdict in this case reversed the effect of the preliminary injunction that was issued to Advantage could not be more erroneous.

In *Sole*, the preliminary injunction was undone by the lower court's final decision denying the plaintiff's request for a permanent injunction against the same ordinance that was preliminarily

enjoined. *Id.* at 2193. Here, however, the preliminary injunction was not undone by the district court's decision on summary judgment, nor the jury's ultimate verdict. Even now, Hopkins cannot go back to its former ways. *Hopkins*, 408 F. Supp. 2d at 794. Moreover, in contrast to the injunction in *Sole* – which was issued at a hearing the day after the complaint was filed in the case – the injunction here was issued over eight months after the filing of Advantage's Complaint. This distinction is key because this Court placed great emphasis on the timing of the hearing in *Sole*. 127 S. Ct. at 2195. Given the distinctions between this case and the facts of *Sole*, the Eighth Circuit's attempt to fit this case into the *Sole* mold should be revisited.

The post-*Sole* question of whether, in the absence of a final decision on the merits, success in gaining a preliminary injunction may sometimes warrant an award of counsel fees has recently been answered in the affirmative by several district courts. *E.g.*, *Oregon Natural Desert Ass'n v. Lohn*, 522 F. Supp. 2d 1295, 1298-99 (D. Or. 2007) (plaintiffs entitled to fees where they obtained initial ruling followed by corrective action and finding of mootness); *Gamble v. Ohio Department of Job & Family Servs.*, 2007 WL 3046492, *3 (S.D. Ohio Oct. 16, 2007) (plaintiffs were prevailing parties with respect to injunction when defendant amended rule to address concerns raised in injunction order); *Californians for Alternatives to Toxics v. United States Forest Serv.*, 2007 WL 2993132, *4 (E.D. Cal. Oct. 11, 2007) ("[t]he court's injunction required an action from the defendants that they otherwise were

not required to perform. Consequently, the plaintiffs were the prevailing parties").

Similarly, Advantage's success as to the injunction necessitated that the City of Hopkins suspend the enforcement of its Sign Ordinance. This victory was not undone on the merits, but rather was vindicated by the City's decision to adopt a new sign code that addressed the constitutional flaws. The Eighth Circuit's application of *Sole* to the disparate facts of this matter was erroneous, particularly in light of the fact that this Court explicitly stated that is was leaving the question of whether, in the absence of a final decision on the merits, success in gaining a preliminary injunction may sometimes warrant an award of counsel fees unanswered.

CONCLUSION

The lower court's issuance of a comprehensive injunction order in favor of Advantage qualifies Advantage as a prevailing party under 42 U.S.C. § 1988. The order in Advantage's favor went beyond the preservation of the status quo and affirmatively prevented the City of Hopkins from enforcing an unconstitutional ordinance. Under established precedent in a majority of the circuit courts of appeal, such a result unquestionably qualifies a litigant as a prevailing party that is entitled to a fee award. In the Eighth Circuit, however, accomplishing such injunctive relief is a hollow victory indeed, unless a litigant ultimately succeeds as to other claims. Thus, the result reached by the Eighth Circuit is contrary to the holdings of this Court and has created a split among the circuit courts that must be addressed.

This petition should also be granted based on the fact that the Eighth Circuit apparently resurrected the "central issue" test in denying Advantage's fee request. Allowing the circuit court's decision to stand would resuscitate a legal theory that this Court overruled almost twenty years ago.

Advantage is also a prevailing party based on the fact that it obtained an order in its favor that was followed by corrective action on the part of the City. Thus, under *Buckhannon*, Advantage, having achieved the injunction and the City's passage of a new sign code, is a prevailing party for the limited purpose of obtaining partial reimbursement for its fees and costs under 42 U.S.C. § 1988.

Finally, granting this Petition will allow the Court to address questions it left unanswered in *Sole*. The Eighth Circuit's attempt to rely on *Sole* to resolve this case, even though this Court expressly limited its application, illustrates the need for additional guidance as to whether the issuance of a preliminary injunction can sometimes be sufficient to convey prevailing party status upon a litigant.

WHEREFORE, Petitioner Advantage Media, L.L.C. respectfully requests that this Petition be GRANTED.

DATED this 4th day of April, 2008.

Respectfully submitted,

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